UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID LANE JOHNSON, Plaintiff, v. NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, ET AL., Defendants.	Civil Action No. 1:17-cv-05131-RJS

DEFENDANT NFLPA'S MEMORANDUM OF LAW
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 56, the National Football League Players Association (the "NFLPA" or "Union") moves for summary judgment against Plaintiff David Lane Johnson's ("Johnson" or "Plaintiff") Labor Management Reporting and Disclosure Act ("LMRDA") claim, brought under 29 U.S.C. § 414.

The Court has held that even if Johnson could ultimately prevail on his LMRDA claim, the "only relief to which [he] would be entitled is a copy of the agreement and side letters in question." Mem. and Order (Oct. 3, 2018), ECF No. 125 ("Dismissal Order") at 17 n.3. Further, this Court has also held that Johnson's LMRDA claim would become "moot once [he] has received a full copy of the collective bargaining agreement – even if that receipt occurred during the course of litigation." *Id.* at 17. Accordingly, in order to promptly bring this litigation to an end for all parties and the Court, the NFLPA has now provided Johnson with a full copy of the relevant collective bargaining agreement (the "CBA") and any modifications thereto. There is, as the Court has held, nothing more that the LMRDA requires. As demonstrated herein, and in the NFLPA's concurrently submitted declarations, this is beyond genuine dispute. Judgment should thus be entered against Johnson's remaining LMRDA claim for mootness as a matter of law.

PROCEDURAL BACKGROUND

On October 3, 2018, the Court granted the NFLPA's motion to dismiss Johnson's duty of fair representation claims and his claim for declaratory relief, but denied the NFLPA's motion as to Johnson's LMRDA claim. The Court described Johnson's remaining LMRDA claim as follows: "Johnson alleges that the NFLPA refused to provide [him] with all side agreements that modified the 2015 [Performance-Enhancing Substances] Policy" (the "2015 Policy").[1] The Court further

[1] Dismissal Order at 16.

held that the maximum relief to which Johnson would be entitled under the LMRDA is a complete copy of the 2015 Policy. As such:

> [G]iven that claims under Section 104 of the LMRDA are mooted when the plaintiff receives a copy of the agreement in question, the only relief to which Johnson would be entitled is a copy of the agreement and side letters in question.[2]

As stated in the Dismissal Order, "courts have treated claims under Section 104 of the LMRDA as moot once the plaintiff has received a copy of the full collective bargaining agreement – even if that receipt occurred during the course of litigation."[3]

Here, the "full collective bargaining agreement" at issue is not the entirety of the NFL-NFLPA CBA for any or all years. Rather, Johnson's First Amended Complaint, ECF No. 39 ("FAC") expressly cabins the relevant CBA for which Johnson seeks LMRDA relief to the 2015 Policy and alleged "side agreements" thereto.[4]

Johnson contends that his LMRDA claim is not moot and plans to "seek[] a jury trial and all damages (economic, non-economic and punitive) and attorneys' fees as provided for by the

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[2] Dismissal Order at 17 n.3 (citation omitted).

[3] Dismissal Order at 17.

[4] *See, e.g.*, FAC ¶ 310 (alleging that "[t]he NFLPA refused to provide Johnson with all the side agreements, modifications, deviations, etc. to the 2015 Policy, which are part of the collectively bargained agreement."); *id.* ¶ 312 ("The NFLPA never provided players the version of the 2015 Policy it claimed applied to Johnson. Instead, the NFLPA placed a different version of the 2015 Policy on the NFLPA's website, which it never changed. Despite substantial modifications to the 2015 Policy, the NFLPA did not update the 2015 Policy available on its website or otherwise notify its player-members of the modifications."); *id.* ¶ 313 ("To this day, the NFLPA has not apprised Johnson of the entirety of the terms of the 2015 Policy."). In Johnson's Memorandum of Law in Opposition to Defendant NFLPA's Motion to Dismiss, he specifically stated that the only documents at issue with regard to his LMRDA claim are any "modifications to the collectively bargained 2015 Policy." ECF No. 112 at 29. And, "[s]pecifically, the NFLPA refused to share with Johnson . . . purported modifications to the collectively bargained 2015 Policy . . . The NFLPA provides a website, which it claims includes the Policy . . . but that link is to a newer policy (*not* the Policy applicable here)." *Id.* (quotations omitted, emphasis added).

LMRDA."[5] But, as demonstrated below, the Court has already (correctly) ruled that such damages relief is not available for Johnson's claim under the LMRDA and, moreover, Johnson long ago waived any right to a jury trial.

STATEMENT OF UNDISPUTED FACTS

As set forth in the NFLPA's concurrently filed Rule 56.1 Statement of Undisputed Material Facts ("SOF"), on October 16, 2018, the NFLPA produced to Johnson a complete copy of the 2015 Policy and all agreements thereunder (including side letters and modifications to the 2015 Policy).[6] The production included:

- A complete copy of the 2015 Policy;
- A letter dated April 22, 2013 from Dennis Curran to Tom DePaso memorializing the NFL and NFLPA's agreement that all NFL players and prospective players shall be required to execute medical record authorization forms as part of each player's pre-employment physical examination;
- A letter dated May 7, 2015 from Adolpho Birch to Tom DePaso modifying the 2014 Policy on Performance-Enhancing Substances to provide that the Directors of the UCLA Olympic Analytical Laboratory and the Sports Medicine Research and Testing Laboratory may fulfill the responsibilities of the Chief Forensic Toxicologist ("CFT") and that "all other responsibilities of the [CFT] as set forth in the Policy shall not be in effect" "[u]ntil such time as the Parties jointly select a new [CFT] to replace Dr. Bryan Finkle";[7] and

[5] Oct. 17, 2018 Email from S. Zashin to NFLPA, attached as Exhibit B to the Declaration of David L. Greenspan ("Greenspan Declaration").

[6] *See* Declaration of Stephen M. Saxon ("Saxon Declaration") ¶¶ 3-5.

[7] The NFLPA previously produced the amendment regarding the CFT to Johnson (on October 25, 2017) in opposing Johnson's motion to vacate the Arbitral Award. *See* ECF No. 113-9.

- Screen shots of player certifications regarding drug testing.[8]

The NFLPA stated in its letter that it made certain that all documents relevant to the 2015 Policy were included by erring on the side of over-inclusiveness with the document production.[9]

With this motion, the NFLPA has submitted a declaration from the NFLPA's labor counsel—Stephen Saxon of the Groom Law Group—in which Saxon attests that: "[i]n late 2016/early 2017, the NFLPA asked me to review and identify documents that could be subject to disclosure under the [LMRDA] with respect to the 2015 NFL-NFLPA Collective Bargaining Agreement"; "[t]he NFLPA's October 16, 2018 production to Plaintiff David Lane Johnson consists of a subset of the identified documents that I had reviewed, specifically, those documents relating to the [2015 Policy]"; and, further, that "I am not aware of—and do not believe that there are—any other documents relating to the 2015 Policy that Mr. Johnson has not received that the NFLPA would be required to produce even if Mr. Johnson were to prevail on his LMRDA claim. For example, I am not aware of any—and understand there is no—side agreement relating to the bargaining parties' interpretation of the timeline for reasonable-cause testing, as Mr. Johnson has alleged."[10]

Further, the NFLPA has submitted a declaration from Heather McPhee, the Union's Associate General Counsel (the "McPhee Declaration"), that she is "not aware of—and do[es] not believe there were any—oral agreements between the NFLPA and the NFL to modify the 2015 Policy."[11]

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[8] SOF ¶ 2 (citing Saxon Decl. ¶ 4; Exhibits A-1 through A-8 to Greenspan Decl.).

[9] SOF ¶ 3 (citing Exhibit A-1 to Greenspan Decl., at 4).

[10] SOF ¶¶ 4-6 (citing Saxon Decl. ¶¶ 2-3, 5).

[11] SOF ¶ 7 (citing McPhee Decl. ¶ 2).

In Johnson's October 22 letter to the Court, he claimed that the NFLPA's document production did not include four documents: (1) a purported amendment regarding "the 2015 Policy requirement that there be three to five arbitrators;" (2) a purported "'understanding' as to the two-year provision under which the NFL Defendants disciplined Mr. Johnson, as allegedly presented by Dr. Lombardo;" (3) "[t]he [UCLA laboratory's] collection procedures and testing protocols referenced in the 2015 Policy, which are part of the 2015 Policy such that the LMRDA requires the NFLPA to produce them upon request by a union member affected by them – like Mr. Johnson;" and (4) "[a]ny amendment to the 2015 Policy regarding replacing the Chief Forensic Toxicologist."[12] The NFLPA responds to each of these contentions below, but notes them here to provide context for each of the following undisputed facts:

With respect to Johnson's assertion that the NFLPA and NFL "amended" the 2015 Policy to provide for two arbitrators instead of three or more, it is undisputed that the NFLPA has produced—*to Johnson, in this case*—an agreement with the NFL (dated December 1, 2016) appointing Arbitrator Shyam Das to serve as the *third* neutral arbitrator for applicable appeals under the Performance-Enhancing Substances Policy ("PES Policy") and Policy and Program on Substances of Abuse to Johnson on October 25, 2017.[13]

With respect to Johnson's assertion that there is some written "understanding" between the NFL and NFLPA about "the two-year provision under which the NFL Defendants disciplined Mr. Johnson," it is undisputed that Arbitrator Carter held in the October 11, 2016 Arbitral Award that the interpretation of the timeline for reasonable cause testing was subject to Dr. Lombardo's

[12] Ltr. From S. Zashin (Oct. 22, 2018), ECF No. 129, at 2.

[13] SOF ¶ 8 (citing Ex. F to Opp'n to Pl.'s Mot. to Vacate An Arb. Award (Oct. 25, 2017), ECF No. 113-6).

discretion—not any agreement to modify the 2015 Policy between the NFL and NFLPA.[14] The Arbitral Award has been confirmed by the Court and is binding on all parties.[15]

With respect to Johnson's position about UCLA's collection procedures and laboratory protocols, it is undisputed—as Arbitrator Carter held—that "[t]hese descriptions of procedures are summaries of laboratory operating procedures"[16] and not any collectively-bargained agreement between the NFL and NFLPA. Arbitrator Carter also declined to order the NFL to produce these documents during the arbitration.[17]

Finally, with respect to Johnson's persistent assertion that the NFLPA has not produced the 2015 Policy amendment regarding the CFT, it is, in fact, indisputable that the NFLPA has produced this very document to Johnson—twice.[18]

ARGUMENT

I. RULE 56 STANDARD

Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Howd v. United Food & Commercial Workers Union, Local 919*, 383 F. App'x 38, 40 (2d Cir. 2010) (citation omitted);

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[14] SOF ¶ 9 (citing Arb. Award ¶ 6.15, 6.19, ECF No. 39-2; Arb. Hr'g Tr. 170:4-171:20, ECF No. 3-10).

[15] Dismissal Order at 21.

[16] SOF ¶ 10 (citing Arb. Award ¶ 6.38, ECF No. 39-2).

[17] SOF ¶ 10 (citing Arb. Award ¶¶ 6.39-6.42, ECF No. 39-2); *see also* Dismissal Order at 15 ("As for the laboratory protocols, the Arbitrator's finding that a 'toxicological observer is not authorized to audit all of the testing laboratory's procedures, and [that] discovery of documents requested for such a purpose [is] not permitted by the Policy' forecloses the possibility that the arbitral process was 'seriously undermined' by the refusal to provide these documents.").

[18] SOF ¶ 11 (citing ECF No. 113-9; Exhibit A-7 to Greenspan Decl.).

Paulino v. New York Printing Pressman's Union, Local Two, 301 F. App'x 34, 37-38 (2d Cir. 2008). Summary judgment for the moving party is appropriate when the nonmoving party "has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof." *Howd*, 383 F. App'x at 40 (citation omitted). A nonmoving party cannot rely on "conclusory allegations or unsubstantiated speculation" to defeat a summary judgment motion. *Id.* Once the moving party meets its burden, the burden then shifts to the non-moving party to designate specific facts demonstrating the existence of genuine issues for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

II. SUMMARY JUDGMENT SHOULD BE GRANTED AGAINST JOHNSON'S LMRDA CLAIM AS A MATTER OF LAW

A. The NFLPA's Production Has Mooted Johnson's LMRDA Claim

As the Court ruled, "Plaintiff's [LMRDA] claim turns on the question of whether the NFLPA's October 16 production has mooted the claim."[19]

The NFLPA's October 16 production was an effort to end litigation with one of its members, to save further litigation costs both for itself and for Johnson, and to avoid the unnecessary burdens of litigation for the Court and all parties. There is no plausible—indeed, no credible—reason why the NFLPA would hold any CBA document back that is relevant to Johnson's claim and subject to disclosure under the LMRDA. And the Saxon Declaration confirms, as a matter of undisputed fact, that no CBA document regarding the 2015 Policy (for which Johnson seeks documents) was held back.[20] That is the end of the matter, and judgment should be entered accordingly. *See Gonzalez v. Local 32BJ, SEIU*, No. 09 CIV. 8464 SHS RLE,

[19] Order (Oct. 23, 2018), ECF No. 131, at 1.

[20] Saxon Decl. ¶¶ 2-5.

2010 WL 3785436, at *4 (S.D.N.Y. Sept. 7, 2010), *report and recommendation adopted*, No. 09 Civ. 8464 (SHS) (RLE), 2010 WL 3785363 (S.D.N.Y. Sept. 28, 2010) ("[Plaintiff] submitted a copy of the CBA with his Complaint. Thus, since [Plaintiff] has a copy of the Agreement, the issue is moot and he has no § 414 claim"); *Mazza v. Dist. Council of N.Y.*, No. Civ. 6854 (BMC) (CLP), 2007 WL 2668116, at *14 (E.D.N.Y. Sept. 6, 2007) ("[P]laintiff was ultimately provided with a copy of the [CBA]. Therefore, the Union is in compliance with the LMRDA.").

In Johnson's recent submissions to the Court, he has previewed his intention to try to manufacture disputes that are neither genuine, nor legally correct, in the hope of saving his LMRDA claim and then trying to transform it into the very retaliation claim that the Court has already rejected. None of Johnson's arguments hold up against the undisputed evidence as a matter of law.

Allegedly withheld documents. For starters, Johnson makes the previously-referenced unfounded assertions about four documents that are ostensibly missing from the NFLPA's October 16 production—but each such document either does not exist, was not collectively bargained, or was already produced.

First, the alleged amendment to the 2015 Policy's requirement that there be three to five arbitrators does not exist.[21] Indeed, the NFLPA produced in this litigation the agreement with the NFL appointing a third arbitrator to the PES Policy[22]—and there can be no genuine dispute that the NFLPA and NFL did in fact finally agree to such a third arbitrator—which demonstrates that there was no amendment to the PES Policy in (or before) 2015 to reduce the number of Policy arbitrators to two. This Court has already recognized that the three-versus-two arbitrator issue is

[21] Saxon Decl. ¶ 5; McPhee Decl. ¶ 2.

[22] ECF No. 113-6.

much ado about nothing.[23] And, regardless, the NFLPA produced long ago the only relevant agreement on this subject appointing a third arbitrator (which did not "amend" any PES Policy). There is no other agreement on this subject to produce.[24]

Second, the Court specifically stated in its Dismissal Order that, according to Johnson's allegations, "the NFLPA has still not produced a copy of the side agreement relating to the bargaining parties' interpretation of the timeline for reasonable-cause testing." Dismissal Order at 17. But, as attested to in the Saxon Declaration, no such side agreement was produced because none exists.[25] Saxon's attestation is on all fours with the arbitral record and Arbitral Award which indisputably (and legally) establish that Dr. Lombardo had the discretion to interpret the 2015 Policy on the question of how long Johnson would remain in reasonable cause testing—there was no collectively-bargained "understanding" among the NFLPA and NFL on this issue.[26]

Third, Johnson's allegations about the ***UCLA*** laboratory's collection procedures and laboratory protocols—which are not collectively bargained—do not, as a matter of law, implicate

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[23] The Court held: "True, the NFLPA and the NFLMC were jointly tasked with choosing 'no fewer than three but no more than five arbitrators' to hear certain appeals under the 2015 Policy. But it took them six months to choose the first arbitrator, three more months to agree upon a second, and eighteen months more to select a third. Johnson filed his timely appeal of the NFLMC's disciplinary decision during the period between the selection of the second and third arbitrators. Johnson's allegation that the NFLPA permitted a deviation from the three-arbitrator requirement in his case amounts to a claim that the NFLPA's timeline for filling the positions was arbitrary. While from Johnson's perspective it may have been preferable or even wise for the NFLPA and the NFLMC to choose three arbitrators more quickly – or at least prior to the arbitration of any disciplinary appeals – their decision to do so in stages was not irrational. Again, the NFLPA retains 'wide latitude' in its role representing employees, and nothing in Johnson's allegations pushes the NFLPA's timeline for appointing arbitrators into the realm of the arbitrary." Dismissal Order at 12 (citation omitted).

[24] Saxon Decl. ¶ 5; McPhee Decl. ¶ 2.

[25] Saxon Decl. ¶ 5.

[26] Arb. Award ¶ 6.15, 6.19, ECF No. 39-2; *see also* Arb. Hr'g Tr. 170:4-171:20, ECF No. 3-10.

any agreement subject to the LMRDA.[27] Moreover, it bears repeating that Arbitrator Carter denied Johnson's request to compel the NFL to produce a copy of the UCLA laboratory protocols because the arbitrator found they were not needed to resolve Johnson's claims.[28] It is hard to see how Johnson could claim that the LMRDA requires disclosure of a document that a labor arbitrator, acting under the auspices of the NFL-NFLPA CBA, ruled Johnson is not entitled to in a final and binding arbitral decision. And Johnson has offered no contrary authority.

Fourth, Johnson's continued demand for the "side agreement" concerning the retirement and replacement of the CFT is simply mystifying because the NFLPA has produced it multiple times.[29] Johnson's argument seems to be that the side letter produced by the NFLPA amended the 2014 PES Policy, rather than the 2015 Policy at issue here. *See* ECF No. 126, at 2. But the plain language of the amendment makes it clear that the parties agreed on a going-forward basis that the Directors of the UCLA laboratory would assume the responsibilities of the CFT "[u]ntil such time as the Parties jointly select a new Chief Forensic Toxicologist to replace Dr. Bryan Finkle." ECF No. 113-9.[30] In light of this express continuing time parameter, the 2014 side letter produced by

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[27] Section 104 of the LMRDA gives union members the right, upon request, to obtain copies of collective bargaining agreements. Plainly, the statute does not require the disclosure of documents that were not collectively bargained. *See Forline v. Helpers Local No. 42*, 211 F. Supp. 315, 319 (E.D. Pa. 1962) (holding that plaintiff's request for a copy of the union's constitution and bylaws fell outside the scope of Section 104 because such documents were not collectively bargained).

[28] Arb. Award ¶¶ 6.36-6.42, ECF No. 39-2.

[29] On October 25, 2017 (*see* ECF No. 113-9) and again on October 16, 2018 (*see supra*).

[30] *See also* Dismissal Order at 11 ("But far from 'seriously undermining' the arbitral process, this 'deviation' in fact was intended to *facilitate* the arbitration. Dr. Finkle, the designated Chief Forensic Toxicologist in the 2015 Policy, retired from the position in 2015. Rather than suspend all arbitrations or subject Johnson to an excessive delay, the NFLPA and NFLMC agreed to a substitute forensic toxicologist who was acceptable to all parties as an interim measure until a new, permanent Chief Forensic Toxicologist could be appointed. As a result, this accommodation was

the NFLPA did amend the 2015 Policy and was accordingly provided to Johnson. In any event, the Saxon Declaration establishes that there is no other agreement about this subject to disclose.[31]

Oral agreements. Johnson will also apparently argue that ***no*** NFLPA document production could moot his LMRDA claim because the LMRDA requires the NFLPA to produce a sworn statement of any oral modification to the 2015 Policy. *See* ECF No. 126, at 2; ECF No. 129, at 2. Johnson provides no authority for his position. Nor does Johnson address the fact that the NFL-NFLPA CBA requires that amendments to the CBA, which includes the 2015 Policy, must be in writing, *see* CBA, Art. 70, § 9, attached as Exhibit C to Greenspan Decl., *and* that arbitral precedent holds the same. *See Wally Williams* (March 9, 1998) (Friedenthal, Arb.), attached as Exhibit D to Greenspan Decl., at 1, 5-6 (holding that pursuant to "Article LV, Section 19 which reads, in part 'None of the Articles of this Agreement may be changed, altered or amended other than by a written agreement,'" an agreement to modify the CBA "must be in writing."). In any event, to eliminate any doubt, the McPhee Declaration attests that there were no oral modifications to the 2015 Policy.[32]

Policy argument. Johnson has also conjured-up a *quasi* policy argument about ostensible "practical" concerns that would ensue if the Court held that the NFLPA could moot Johnson's LMRDA claim "nearly two years after he filed this action" by producing the requested documents. ECF No. 126 at 2. Specifically, Johnson argues:

> Practically, if this Court permitted the NFLPA to moot Johnson's LMRDA claim, then unions could rely upon this case to refuse an employee's request for the applicable collective bargaining agreement, force that employee to go through arbitration without knowledge of the applicable agreement, require that employee

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necessary to the orderly implementation of the [2015 Policy], and in no way undermined the arbitral process.") (internal citations omitted; emphasis in original).

[31] Saxon Decl. ¶ 5.

[32] McPhee Decl. ¶ 2.

> to file a federal lawsuit to obtain a copy of the applicable agreement, and then, after the employee has done all this, provide a copy of the applicable agreement to the employee and nothing more. Such an impractical conclusion would serve only to encourage union misconduct.

ECF No. 126 at 2-3. This is absurd. The notion that any union would view the litigation history here—years of expensive and disruptive litigation with a member—as an aspirational roadmap is sheer fantasy. Moreover, at this point, it is quite clear that Johnson has no "practical" concerns at all—there simply is nothing the NFLPA could ever do to satisfy him.

On top of the fact that Johnson's policy argument has no merit, it contravenes the plain language of the LMRDA, the Court's Dismissal Order and the precedents cited by the Court. *See* 29 U.S.C. § 414; Dismissal Order at 17 (Johnson's LMRDA claim becomes moot once he receives a full copy of the 2015 Policy "even if that receipt occur[s] during the course of litigation"); *Gonzalez*, 2010 WL 3785436, at *4; *Mazza*, 2007 WL 2668116, at *14. This position thus fails multiple times over as a matter of law.

Retaliation claim. Finally, Johnson tries to stave off judgment against his LMRDA claim by recasting it as something that it is not. Johnson argues that he brought "claims under Title I of the LMRDA, including both Mr. Johnson's claim for failure to provide him a complete copy of the 2015 Policy and his claim for retaliation for asserting his rights under the LMRDA," and that "[t]he NFLPA has never addressed Mr. Johnson's retaliation claim." ECF No. 129 (internal citation omitted); *see also* ECF No. 126 at 1. This too is frivolous several times over.

For starters, in his FAC, Johnson alleges that "[t]he NFLPA has refused to share with Johnson [] purported modifications to the collectively bargained 2015 Policy" and cites Section 104 of the LMRDA. FAC ¶¶ 25, 308. Johnson also quotes Section 104 of the LMRDA in all three of his oppositions to the NFLPA's motions to dismiss. *See* ECF No. 43 at 14-15; ECF No. 54 at

14-15; ECF No. 112 at 24-25.[33] Section 104 is the LMRDA provision dealing with a union's obligation to disclose documents—which is all that Johnson has ever alleged with respect to his cause of action under the LMRDA. *See* 29 U.S.C. § 414 (requiring unions to provide a "copy of each collective bargaining agreement" to an employee "who requests such a copy and whose rights as such employee are directly affected by such agreement.").

To be sure, there are *other* sections of the LMRDA that could apply to a union retaliating against a member. *See, e.g.*, 29 U.S.C § 411(b)(5) (creating "[s]afeguards against improper disciplinary action" by a union against a member). But Johnson has never once invoked any such LMRDA provision in any of his complaints or in any of the many, many briefs filed first in Ohio and then in New York concerning his claims. Rather, Johnson has persistently—and consistently—exclusively based his LMRDA cause of action on the NFLPA's alleged failure to provide certain collectively bargained documents (even though Johnson does include in the FAC the conclusory factual allegation that the failure to provide documents was somehow retaliatory in nature). *See, e.g.*, *supra* n.4; FAC ¶ 314.

Equally important, the NFLPA *did* address Johnson's factual retaliation allegation in seeking dismissal of Johnson's *duty of fair representation* claim. So did the Court: "Johnson's final argument, that the NFLPA breached its duty of fair representation by . . . retaliating against Johnson, is equally unavailing." Dismissal Order at 15-16. Indeed, Johnson's own discussion of his retaliation allegations against the NFLPA—in his memoranda opposing the Union's dismissal motion—was solely with respect to his duty of fair representation claim. *Compare* NFLPA Mem. in Supp. of Mot. to Dismiss, ECF No. 109, at 18-20; NFLPA Rep. in Supp. of Mot. to Dismiss,

[33] In his Opposition to the NFLPA's motion to dismiss, Johnson describes his LMRDA claim as follows, without referencing retaliation: "Johnson requested a complete copy of the Policy, and the NFLPA violated the LMRDA by refusing to provide it to him." ECF No. 112 at 24.

ECF No. 119, at 7 *with* Johnson Opp. to NFLPA Mot. to Dismiss, ECF No. 112 at 21-24. Johnson never once couched his retaliation allegations as an LMRDA violation until after the Court dismissed every other one of his causes of action. It is too late for Johnson to do so now, but more fundamentally, the Court has already ruled that Johnson cannot state a claim for retaliation against the NFLPA.

B. Johnson's LMRDA Claim Should Also Be Dismissed Because He Has Suffered No Injury In Fact

The Court's Dismissal Order confirms that judgment should also be entered against Johnson's LMRDA claim because, independent of the fact that it is moot, Johnson suffered no injury from the NFLPA's alleged failure to disclose the documents in question and therefore lacks standing. As a matter of law, the "irreducible constitutional minimum" of Article III standing requires a plaintiff to show an (1) "injury in fact" (2) that is "fairly traceable to the challenged conduct of the defendant" and (3) "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016), as revised (May 24, 2016). A plaintiff does not automatically satisfy the injury in fact requirement "whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at 1549. Here, all of Johnson's *alleged* injuries flow from the adverse Arbitral Award.[34] And the Court has now ruled that none of the purported side agreements that Johnson claims are missing "seriously undermined the arbitral process" (Dismissal Order at 12-13), and the (confirmed) Arbitral Award held that none of the allegedly improperly withheld documents impacted the arbitral outcome. *See, e.g.*, Arb. Award ¶ 6.26 (CFT); *id.* ¶¶ 6.13-6:20 (reasonable cause testing); *id.* ¶¶ 6.21-6.42 (collection procedures and testing protocols), ECF No. 39-2. Therefore, as a matter of law, Johnson, who is

[34] *See* NFLPA Mem. in Supp. of its Mot. to Dismiss, ECF No. 109, at 8-9; NFLPA Rep. in Supp. of its Mot. to Dismiss, ECF No. 119, at 3-5.

bound by the confirmed arbitral award, cannot prove injury in fact traceable to the alleged LMRDA violation and he thus lacks standing.

III. JOHNSON IS NOT ENTITLED TO A JURY TRIAL

A. As A Matter of Law, Johnson Waived His Right To A Jury Trial

The failure to demand a jury trial within 14 days of the filing of the last responsive pleading constitutes a waiver of that right as to all issues raised in the complaint. Fed. R. Civ. P. 38(b), (d). Here, Johnson pled his LMRDA claim in the Original Complaint filed on January 6, 2017, and declined to request a jury trial. *See* ECF No. 1-1 at 1 (checking "no" to "jury demand"). Johnson also failed to submit a jury demand within 14 days after the NFLPA filed its Answer and Defenses to the Complaint (ECF No. 28) (*i.e.*, the "last responsive pleading") on February 1, 2017.[35] Thus, Johnson waived his right to demand a jury trial for his LMRDA claim.

Johnson's filing of the FAC did not revive his right to demand a jury trial for two reasons. One, he again neglected to include a jury demand. Two, and more importantly, the right to a jury trial is "revived . . . ***only if the amendment changes the issues***." *Lanza v. Drexel & Co.*, 479 F.2d 1277, 1310 (2d Cir. 1973) (citing *Western Geophysical Co. of America, Inc. v. Bolt Associates, Inc.*, 440 F.2d 765, 769 (2d Cir. 1971)) (emphasis added). Put differently, the right to demand a jury trial is revived only when "the amended pleading is ***significantly different from the original pleading***; the mere addition of extra details or new legal arguments will not suffice." *Westchester Day Sch. v. Vill. of Mamaroneck*, 363 F. Supp. 2d 667, 670 (S.D.N.Y. Apr. 1, 2005) (emphasis added); *see also Trixler Brokerage Co. v. Ralston Purina Co.*, 505 F.2d 1045, 1050 (9th Cir. 1974)

[35] Johnson did not file a jury demand until October 19, 2018—more than 20 *months* after the statutory deadline had passed. *See* Pl.'s Jury Demand, ECF No. 127.

(holding that plaintiff is not entitled to a jury demand when the amended complaint merely clarifies allegations made in the original complaint).

Johnson's FAC falls well short of being "significantly different from the original pleading." Johnson himself admitted that he filed the FAC in order "[t]o remove any doubt that his claims are properly before this Court [in Ohio]." Pl.'s Mem. in Opp. to Def. NFLPA's Mot. to Dismiss, ECF No. 43, at 1.[36] Far from "chang[ing] the issues," Johnson's additional allegations relating to his LMRDA claim simply clarify or expand on allegations already included in the Original Complaint. *See* FAC ¶ 307 (alleging that "Johnson requested of the NFLPA these purported modifications to the collectively bargained 2015 Policy" during the arbitration process); *id.* ¶ 311 (alleging that, during the arbitration process, "[u]pon requesting one of these side agreements . . . the NFLPA told Johnson that he should obtain it from the NFLMC"); *id.* ¶ 312 (alleging that the "NFLPA never provided players the version of the 2015 Policy it claimed applied to Johnson . . . [and instead] placed a different version of the 2015 Policy on the NFLPA's website, which it never changed."). Such additional allegations in the FAC were plainly insufficient to revive Johnson's right to pursue the jury trial that he waived after failing to request a jury in his original Complaint or within 14 days after the NFLPA answered.

B. Johnson Is Also Not Entitled To A Jury Trial Because Only Equitable Relief Is Available Here

Finally, Johnson is also not entitled to a jury trial because only equitable relief is available for his LMRDA claim. "[N]o right to a jury attaches to claims for equitable relief." *CSC Holdings, Inc. v. Westchester Terrace at Crisfield Condo.*, 235 F. Supp. 2d 243, 264 (S.D.N.Y. Oct. 21, 2002); *see also McCraw v. United Ass'n of Journeymen & Apprentices of Plumbing & Pipe Fitting*

[36] The Northern District of Ohio nonetheless transferred Johnson's case to this District. *See* ECF No. 68.

Indus. of U. S. & Canada, 341 F.2d 705, 709 (6th Cir. 1965) (denying jury demand because claim under Section 102 of the LMRDA was "essentially an equity proceeding . . . with the recovery of damages being merely incident to such relief").

As this Court found, the only relief to which Johnson would be entitled if he were to prevail on his LMRDA claim is equitable relief (and not damages)—*i.e.*, a court order granting him a "copy of the agreement and side letters in question." Dismissal Order at 17 n.3. Consistent with the Court's findings, the NFLPA has not been able to locate *any* case in which a court has awarded damages under Section 104 of the LMRDA, and the cases that Johnson has cited on this point are inapposite as they did not address claims under Section 104.[37] Since Johnson cannot recover damages for his LMRDA claim, he has no right to demand a jury trial.

[37] In the parties' October 18 Joint Submission, Johnson argues that he may seek various damages under his LMRDA claim by citing to six cases. *See* ECF No. 126, at 1-2 n.1. But none of these cases even references the only section of the LMRDA upon which Johnson bases his claim, *i.e.*, 29 U.S.C. § 414 ("Right to copies of collective bargaining agreements"). As discussed in the NFLPA's October 19 letter to the Court, these cases are not relevant and do not cast doubt on the Court's finding that damages are not available to a plaintiff alleging that his union failed to provide documents under 29 U.S.C. § 414. *See* ECF No. 128.

CONCLUSION

For all the reasons set forth above, summary judgment should be granted against Johnson's remaining LMRDA claim against the NFLPA and the case should be closed.

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Respectfully submitted,

s/ Jeffrey L. Kessler

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